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COMMISSION ON HUMAN RIGHTS

Inter-sessional open-ended working group
on a draft optional protocol to the
Convention on the Rights of the Child
on involvement of children in armed
conflicts
First session
31 October - 11 November 1994

COMMENTS ON THE PRELIMINARY DRAFT OPTIONAL PROTOCOL

Report of the Secretary-General

Addendum

The present document contains comments submitted by the Governments of Australia, Germany and Japan and by the Crime Prevention and the Criminal Justice Branch, the United Nations High Commissioner for Refugees, the Economic Commission for Africa and the International Committee of the Red Cross, as well as by the following non-governmental organizations: Action for Children Campaign and Friends World Committee for Consultation.

GE.94-14286 (E)

AUSTRALIA

[Original: English]
[19 August 1994]

Article 1

1. This draft article is identical to article 38 (2) of the Convention on the Rights of the Child, except that it substitutes the term "18 years" for the "15 years" currently contained in article 38 (2) and omits the reference to "direct" part in hostilities.

2. In so far as draft article 1 can be read with the obligation not to recruit persons under 18 years in draft article 2, this clause would appear to allow for persons under 18 who are currently recruited into the Australian Armed Forces to retain that status, but would place an obligation on Australia to take all feasible measures to ensure that those persons do not participate in hostilities.

3. Some comment should also be made on the omission of the word "direct" in draft article 1 of the protocol. It is arguable that the obligation as phrased in draft article 1 may be too wide, in that it would, inter alia, prevent persons under 18 from participating in agricultural or factory or other type of work during a period of armed conflict. By comparison, article 38 (2) would seem to place the obligation on States not to allow persons under 15 to participate directly in the hostilities. This would seem to be a more realistic requirement.

4. The term "direct" was discussed in the commentary to article 77 of Additional Protocol I to the Geneva Conventions. Those comments are of equal relevance in the context of the draft Protocol to the Convention on the Rights of the Child.

Article 2

5. The major obligation imposed on States by the draft protocol is contained in draft article 2, which provides that "States parties shall refrain from recruiting any person who has not attained the age of 18 years into their Armed Forces".

6. If this clause is intended to prevent children under 18 from actually participating in situations of armed conflict as combatants, it may be acceptable. However, if it goes further and would prevent recruitment of persons under 18 into the armed forces, even in times of peace, Australia would have difficulty complying, since persons under 18 are subject to such recruitment.

7. This clause revises article 38 (3) of the Convention on the Rights of the Child which, as recognized in the preamble to the draft protocol, allows the recruitment of persons into armed forces and their direct participation in hostilities after the attainment of the age of 15 years. That the protocol is intended to supersede article 38 of the Convention is made clear by draft

article 6 which provides that "the provisions of the protocol shall apply to the States parties instead of article 38, paragraphs 2 and 3, of the Convention".

8. Since the object of the draft protocol is to prevent children under 18 from participating in hostilities, some clarification should be sought as to the intended scope of draft article 2. It may be possible to refine the draft article so as to allow for general recruitment into the armed forces in times of peace but at the same time still obliging States not to use those recruits in times of war. This possibility is discussed further below.

Article 3

9. Draft article 3 of the protocol seems to be acceptable in the sense that it would allow any other provisions of international humanitarian law which are more conducive to the realization of the rights of the child to be applied. In this regard, article 77 of Protocol I Additional to the Geneva Conventions of 12 August 1949, contains a provision that mirrors article 38 of the Convention on the Rights of the Child. Article 77 (2) provides:

> "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years to not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."

10. The official commentary of the International Committee of the Red Cross on the Additional Protocols makes the following points in relation to this article:

(a) The second sentence of the paragraph is the result of a compromise; in fact, in an amendment one delegation had proposed that the limit on non-recruitment should be raised from 15 to 18 years. The majority was opposed to extending the prohibition of recruitment beyond 15 years, but in order to take this proposal into account it was provided that in the case of recruitment of persons between 15 and 18, priority should be given to the oldest;

(b) With regard to the entire paragraph, the ICRC regarded the participation of children and adolescents in combat as an inhumane practice and considered it should come to an end because of the mortal danger for the children themselves and also for the many people who might be exposed to the erratic behaviour of children carrying lethal weapons in such a situation;

(c) Nevertheless, the ICRC proposals encountered some opposition, as on this point Governments did not wish to undertake unconditional obligations. The ICRC had suggested that the parties to the conflict should "take all necessary measures", which became in the final text, "take all feasible measures" (this language is retained in the text of both the Convention on the Rights of the Child and the draft protocol);

(d) Although the obligation to refrain from recruiting children under 15 years was contained in the text, the obligation to refuse their voluntary involvement was not explicitly mentioned. According to the rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under 15;

(e) The text refers to taking a direct part in hostilities. The ICRC proposal did not include this word. This leads to the question whether indirect acts of participation are covered. Examples would include, in particular, the gathering and transmission of military information, transportation of arms and munitions, provision of supplies, etc. The commentary notes that the intention of the drafters of the article was clearly to keep children under 15 outside situations of armed conflict, and consequently they should not be required to perform such services. However, if it does happen that children under 15 spontaneously or on request perform such acts, precautions should at least be taken. For example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such.

11. The ICRC commentary does not give any guide as to why the age of 15 years was chosen for the primary obligation. It also does not provide any guidance as to the meaning of recruitment and whether this obligation would prevent the recruitment of persons under 18 years into the armed forces in times of peace. In this regard, however, it should be noted that Australia is a party to Additional Protocol I. From the official commentary, it is clear that the main objective is to prevent persons under the age of 15 from participating in situations of armed conflict. It is possible, therefore, that the provision may be interpreted in a way which would nonetheless enable their recruitment into the armed services during times of peace but would prevent their being sent into combat situations prior to attaining the age of 18 years. This interpretation could be supported by the fact that the Geneva Conventions and the two Additional Protocols operate essentially in times of war and accordingly the obligations contained therein become activated once a situation of armed conflict arises (although it must be conceded that, even during times of peace, there are some obligations that would still be imposed on States parties. Whether the obligation against recruitment is one of them is open to question).

12. It is also worth noting that article 77 (3) of Additional Protocol I provides that:

> "If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of 15 years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war."

13. This article clearly envisages that in some cases children even below the age of 15 years might participate directly in hostilities. Recognizing this fact, the Additional Protocol insists that they, along with all other children, shall be afforded the protections set out in article 77. These include being detained separately from adults (apart from the situation where families are accommodated as family units) (art. 77 (4)), and prohibition of

the death penalty for persons under the age of 18 (art. 77 (5)). Article 3 of the draft protocol to the Convention on the Rights of the Child would retain these provisions. It should be supported on that basis.

GERMANY

[Original: English]
[17 August 1994]

1. The Government of the Federal Republic of Germany regrets the fact that under article 38 (2) of the Convention even 15-year-olds may take part in hostilities as soldiers, because this age limit is incompatible with the consideration of a child's best interest (art. 3 (1) of the Convention). It declares that it will not make any use of the possibility afforded by the Convention of fixing this age limit at 15 years.

2. The German Government appreciates the fact that compulsory recruitment should not be admissible under the age of 18. This corresponds to the initiative's aim to protect children and young persons from the effects of participating in armed conflicts.

3. However, the German Government considers it possible to give article 2 of the draft optional protocol a more flexible wording. Where, on the basis of compulsory military service, there is a desire to enter military service before the age of 18 is attained, this should remain possible and admissible.

JAPAN

[Original: English]
[15 August 1994]

1. Replace preambular paragraph 5 of the preliminary draft optional protocol on involvement of children in armed conflicts with "Noting that article 1 of the Convention provides, 'For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.'" Citing the exact wording of article 1 of the Convention is required as the preliminary draft's preambular 5 gives an impression that the Convention defines all those who are under 18 years of age to be a child, and such a misinterpretation needs to be avoided.

2. Add the words "a direct" before "part in hostilities" of article 1 of the preliminary draft. Article 1 of the preliminary draft corresponds to article 38, paragraph 2, of the Convention. It may be recalled that article 38, paragraph 2, stipulates that "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities." Meanwhile, article 1 of the preliminary draft raises the age from 15 to 18 of those "who take a direct part in hostilities" and does not propose any changes in the context of article 38, paragraph 2. Hence, the word "direct" needs to be retained.

3. Add "as combatants that take a direct part in hostilities" after the words "into armed forces" of preambular 8 of the preliminary draft. Also, add "as a combatant that takes a direct part in hostilities" after the words "into

their armed forces" of article 2 of the preliminary draft. The reasons for these proposals are as follows: paragraph 2 of the preliminary draft, in relation to article 1 of the same draft, secures that those who are under 18 years of age do not participate directly in hostilities and protects them from the danger of armed conflicts. On the other hand, it must be noted that within an armed force there exist various units such as combat troops, which participate directly in hostilities, and military schools, medical and research units that do not participate directly in combat. In the view of the objective of this article, it is desirable to have wording indicating specifically that recruitment of "those combatants who take a direct part in hostilities" who are under the age of 18 should be refrained from.

CRIME PREVENTION AND CRIMINAL JUSTICE BRANCH

[Original: English]
[23 August 1994]

The preliminary draft appears to be an excellent starting point for further consultations, and its drafters should be congratulated for this important initiative. In its further elaboration, the following suggestions may be taken into consideration:

(a) A new paragraph may be inserted after the fourth preambular paragraph as follows:

> "Further recognizing that the involvement of persons under the age of 18 in armed conflict may have a profound, far-reaching detrimental impact on the harmonious development of the child".

This would further emphasize the harmful effects which ensue from the direct involvement of children in armed conflict;

(b) A new preambular paragraph, following the present fifth preambular paragraph, might read as follows:

> "Further noting that the United Nations Guidelines for the Prevention of Juvenile Delinquency and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty recognize every human being below the age of 18 years to be a child".

The fact that other United Nations instruments in the field of juvenile justice recognize a human being under the age of 18 years to be a juvenile may serve to strengthen the position that the involvement of persons under 18 years of age in armed conflict is undesirable.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

[Original: English]
[2 September 1994]

1. Paragraph 4 of the preamble could be strengthened by replacing "Believing" with "Recognizing". In addition, we suggest that the substitution of "enjoyment of the rights" for "implementation" in line 3 of the same paragraph may provide clarification.

2. We suggest that in paragraph 8 of the preamble, the brackets be deleted and the limitation to "direct" participation in hostilities be removed, thereby expanding the ambit of the protocol to include "indirect" participation in hostilities. Moreover, we consider that the last part of the same sentence is not necessary and can therefore be deleted from "[...] while giving States" to "[...] such a protocol".

3. Article 1 should clearly refer to the prevention of both indirect and direct participation of children in hostilities in order to prevent the problems of child participants supporting the activities of the armed forces in functions such as porters, spies and mine sweepers. We suggest that after [...] "have not attained the age of 18 years", the words "shall not be recruited into the armed forces nor allowed to participate in hostilities directly or indirectly in the performance of any support function that may expose them to danger".

4. We suggest that article 2 be rewritten to clearly prohibit the voluntary enlistment, as well as forced recruitment, of persons under the age of 18 years. This Office has had the benefit of reading the comments of the Friends World Committee for Consultation (Quakers) on the proposed optional protocol. We consider that the Quakers' suggested article 2 is a good replacement for the present article 2: "States parties shall neither recruit nor permit voluntary enlistment of any person under the age of 18 years".

5. UNHCR requests that the Committee consider including in the protocol a power to act if it receives reliable information that children are being forcibly recruited in contravention of the protocol.

ECONOMIC COMMISSION FOR AFRICA

[Original: English]
[22 June 1994]

ECA agrees wholeheartedly with the proposal to raise the age of recruitment into the armed forces to 18 years. Even though concrete figures may not be available, ECA is aware of the fact that many African children are involved in armed conflicts at a tender age, with little understanding of the reasons behind those conflicts.

INTERNATIONAL COMMITTEE OF THE RED CROSS

[Original: English]
[11 August 1994]

1. Within its mandate to protect and assist victims of armed conflicts, the International Committee of the Red Cross is concerned by the plight of children who, precisely because of their vulnerability, require special protection and assistance.

2. The recruitment of children and their participation in hostilities are without doubt one of the major problems in current conflicts. These practices are harmful for them physically and psychologically and affect the full implementation of the general and special protection of children during armed

conflict situations, as provided for in the Geneva Conventions of 1949 for the protection of war victims and their Additional Protocols of 1977.

3. The participation of children in hostilities is contemplated in article 77, paragraph 2, of Additional Protocol I and in article 4, paragraph 3 (c) of Additional Protocol II, applicable during international and non-international armed conflicts respectively. These provisions prohibit their participation in hostilities under the age of 15, with the recommendation, in the law applicable during international armed conflicts, that in recruiting among those persons who are between 15 and 18 years, priority should be given to the oldest. These rules are recalled in paragraphs 2 and 3 of article 38 of the Convention on the Rights of the Child, which the preliminary draft optional protocol intends to strengthen by raising the age of recruitment to 18. The ICRC welcomed and supported this initiative and made the following comments.

4. With reference to States parties, the proposed draft optional protocol appeared to address the issue of raising the minimum age of recruitment to governmental armed forces only. However, international humanitarian law applicable in non-international armed conflicts applies to parties to the conflict, including opposition movements. Thus, it would be important to extend the notion to include all parties - not only States parties - to armed conflicts, in order not to weaken the obligations of existing law.

5. The ICRC also proposed to improve the protection of children by requiring that States parties and parties to a conflict take "all necessary measures", instead of "all feasible measures". As it stands, the wording of article 1 of the draft optional protocol means that voluntary participation by children is not totally prohibited. At the 1974-1977 Diplomatic Conference which adopted the 1977 Additional Protocols, the ICRC had suggested the words "necessary measures", but this was, unfortunately, not accepted.

6. Finally, it was important to recall in this new instrument the safeguard clause contained in paragraph 1 of article 38 of the Convention on the Rights of the Child, which reads "States parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child". International humanitarian law protected children as members of the civilian population, and afforded to those who do not participate in hostilities a special protection contained in no less than 25 articles.

ACTION FOR CHILDREN CAMPAIGN

[Original: English]
[15 August 1994]

1. Action for Children Campaign had been greatly alarmed by recent reports of the plight of young women and children being sexually abused - including what appeared to be systematic and organized rape - during the current conflict in the former Yugoslavia.

2. The organization noted that in paragraph 17 of its resolution 1994/91, the Commission on Human Rights expressed deep concern at the continued exploitation and abuse of children, requiring effective measures against, in

particular, the sale of children, child prostitution and child pornography. Action for Children Campaign therefore recommended that a paragraph be introduced into the preliminary draft optional protocol, in order to confirm again these expressions of "deep concern".

3. The organization further recommended that an article be introduced into the protocol that would offer some protection to the victims of armed conflicts who are children.

FRIENDS WORLD COMMITTEE FOR CONSULTATION (QUAKERS)

[Original: English]
[11 August 1994]

1. Friends World Committee for Consultation (Quakers) submitted comments on the preliminary draft optional protocol on behalf of the NGO Sub-Group on Refugee Children and Children in Armed Conflict of the NGO Group for the Convention on the Rights of the Child. The members of the Sub-Group were: Associated Country Women of the World, Friends World Committee for Consultation (Quakers), International Abolitionist Federation, International Federation Terre des Hommes, International Social Service, Radda Barnen, Women's World Summit Foundation, World Council of Churches and World Organization Against Torture (SOS Torture).

2. The NGO Sub-Group welcomed the proposal for an optional protocol to the Convention on the Rights of the Child. The Committee on the Rights of the Child made a useful contribution by preparing a preliminary draft optional protocol. However, the preliminary draft appears to address the issue of raising the minimum age of recruitment (from 15 to 18 years) into governmental armed forces only. It should also be included in the protocol that recruitment below the age of 18 years should be prohibited in all circumstances into all armed forces, including:

(a) Regular governmental armed forces;

(b) Irregular governmental armed forces;

(c) Government initiated or condoned armed forces (such as militias and civil defence forces);

(d) Any other armed force or group (such as opposition forces and private groups).

3. The nature of participation in hostilities which falls within the prohibition should be clarified. It is proposed that this should be covered in a new article, reading as follows:

> "Children who have not attained the age of 18 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities directly or in the performance of any function that would qualify the person as a combatant under humanitarian law."

4. There should be clarification that "recruitment" covers both compulsory and voluntary involvement in armed forces. This could be covered by amending the proposed article 2 to read: "States parties shall neither recruit nor permit voluntary enlistment of any person under the age of 18 years."

5. States parties should be under an obligation to make it a criminal offence knowingly to recruit persons under the age of 18 years, including aiding, attempting, abetting, conspiring, offering employment or other activities enabling recruitment or participation in armed conflict. The offence occurs irrespective of the nationality of the persons involved and the place of service; that is, it is a crime of universal jurisdiction (and not a political offence) requiring Governments to extradite or try alleged offenders. It should be understood that the child does not commit an offence by being involved; it is the person who recruits or accepts the voluntary offer of the child whose act is criminal.

6. The Committee on the Rights of the Child should be given a power equivalent to that contained in article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to act if it receives reliable information which appears to it to contain well-founded indications that children are being systematically recruited.

7. In making these proposals, the NGO Sub-group recognized that the protocol will be addressed to Governments. However, the principle that no one under the age of 18 years should be serving in armed forces should be clearly stated.